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ATTORNEYS FOR PLAINTIFFS

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER, Plaintiffs, v. MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants.	Cause No. DV 15-1152A Judge David M. Ortley PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF STANDING

INTRODUCTION

Last year, the Montana Legislature passed a scholarship tax-credit program to help low-income families afford to send their children to the school of their choice. For Plaintiffs—three mothers of limited financial means who currently make tremendous sacrifices to send their children to Stillwater Christian School—the creation of the program was momentous. That was, until the Defendant Montana Department of Revenue passed a rule ("Rule 1") excluding from the program scholarships to those who wish to attend religious schools. As a result, Plaintiffs cannot apply for any scholarships under the program for their chosen school. Plaintiffs brought this lawsuit alleging that Rule 1 violates their rights to religious freedom and equal protection.

Now, Defendants the Department of Revenue and its director Mike Kadas ("DOR") have filed a Motion to Dismiss for Lack of Standing, asserting that Rule 1 has not caused any of the Plaintiffs' injury. DOR primarily argues that there is no guarantee Plaintiffs could obtain a scholarship absent Rule 1. DOR's motion has neither factual nor legal support.

Plaintiffs clearly have standing. Both the Montana and U.S. Supreme Courts have held that when the government imposes a discriminatory barrier on those wishing to apply for a government benefit, the presence of the barrier itself constitutes an injury for standing purposes. These courts emphasize that this injury exists regardless of whether the plaintiff could ultimately obtain the benefit if not for the barrier; all that matters is that the plaintiff is otherwise eligible and willing to apply. Here, Plaintiffs' allegations have more than adequately satisfied this standing standard. Plaintiffs desperately wish to obtain scholarships for their children to attend Stillwater Christian, would be eligible to apply for scholarships to Stillwater if not for Rule 1, and are prepared to apply for such scholarships as soon as the Rule is lifted.

Thus, this lawsuit is not merely an "academic" exercise, as DOR claim, but an ardent attempt by three mothers to ensure the best future for their children. Plaintiffs respectfully urge this Court to deny Defendants' Motion to Dismiss.

BACKGROUND

Montana's new scholarship tax-credit program went into effect on January 1, 2016. Under that program, Montana taxpayers can now receive a tax credit for donations of up to $150 that they make to private scholarship organizations ("SOs"). SOs, in turn, provide scholarships to students to attend private schools. These private schools are called "qualified education providers."

Although the statute creating the program permits virtually all private schools in Montana to be qualified education providers, DOR's Rule 1 bans religious schools from participating in the program. As most of Montana's private schools are religious, Rule 1 excludes the majority of Montana private schools from participating in the program, including Stillwater Christian School where Plaintiffs have enrolled their children.

To date, one SO, Big Sky Scholarships, has formed and registered with DOR.[1] Hansen Aff. ¶¶ 3-4. Big Sky has already started to fundraise for the 2016-2017 school year and would like to provide scholarships to students attending all schools, including Stillwater Christian. Hansen Aff. ¶¶ 5, 7, 12. Yet Rule 1 prohibits Big Sky from granting scholarships to any student attending a religious school. *Id.* ¶ 8. Consequently, Rule 1 precludes Plaintiffs from applying for scholarships to attend the school of their choice, let alone receiving such scholarships.

[1] DOR approved Big Sky's registration on February 2, 2016, the day after DOR filed its Motion to Dismiss.

DOR has already begun implementing Rule 1. This is evident through DOR's procedures for its web portal that administers the program.[2] Any taxpayer who wishes to obtain a tax credit under the program must use this web portal and indicate to which SO it is donating. The web portal provides a list of the registered SOs, along with the qualified schools with which the SOs affiliate. DOR has told SO applicants that to be a registered SO and included on the portal, the applicant must provide a list of at least two private schools with which it is affiliated. Hansen Aff. ¶¶ 9. Because of Rule 1, DOR prohibits SOs from affiliating with any religious private school. Hansen Aff. ¶¶ 9-10.

For instance, Big Sky would like to affiliate with both Mission Valley Christian Academy and Stillwater Christian, and these schools also wish to affiliate with Big Sky. Hansen Aff. ¶¶ 6-7; Makowski Aff. ¶ 7. But DOR has prohibited Big Sky from affiliating with these schools. Hansen Aff. ¶¶ 9-11. Thus, as a result of Rule 1, no Montana taxpayers can receive a tax credit for donating to an SO affiliated with a religious school.

LEGAL STANDARDS

There are two relevant legal standards concerning DOR's Motion to Dismiss: the standard for considering dismissal and the standard for establishing standing.

When a court considers a motion to dismiss for lack of standing, a court must view the allegations in the light most favorable to the plaintiff and accept as true all facts well pleaded. *See, e.g.*, *Helena Parents Comm'n v. Lewis & Clark Cty. Comm'rs*, 277 Mont. 367, 371, 922 P.2d 1140, 1142 (1996).

To have standing in Montana, a plaintiff must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens presentation of issues."

[2] The portal can be found at https://svc.mt.gov/dor/educationdonations/UserConfig.aspx. It requires both a Montana ePass registration and a registered username to access.

E.g., *Bryan v. Yellowstone Cty. Elem. Sch. Dist.* No. 2, 2002 MT 264, ¶ 20, 312 Mont. 257, 60 P.3d 381. This principle is embodied in Montana's constitutional standing requirement.[3] *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 31, 360 Mont. 207, 255 P.3d 80. To satisfy this requirement, a plaintiff must allege (1) a past, present, or threatened injury to a property or civil right and (2) that this injury would be alleviated by successfully maintaining the action. *Id.* ¶ 33; *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 26, 366 Mont. 450, 288 P.3d 193.

ARGUMENT

DOR's Motion to Dismiss claims that Plaintiffs failed to allege that Rule 1 causes them sufficient injury for standing. DOR argues that there is no guarantee that Plaintiffs would obtain scholarships if not for Rule 1, and in any event, the scholarships may not be essential to their children's continued attendance at Stillwater Christian. The courts have repeatedly rejected these type of arguments.

Plaintiffs' allegations easily establish the requisite injury under the case law. Both the Montana and U.S. Supreme Courts hold that when the government imposes a discriminatory barrier on those wishing to apply for a benefit, this barrier constitutes an injury for standing

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[3] The constitutional standing requirement derives from Article VII, Section 4 (1) of the Montana Constitution, which states that a district court can only have jurisdiction over "cases at law and in equity." Constitutional standing must be distinguished from prudential standing. DOR's motion only moved on the basis of constitutional standing, not prudential.

Prudential standing is in the discretion of the court, and courts generally consider whether: (1) a plaintiff only asserts her own constitutional rights or immunities, and (2) whether the alleged injury is distinguishable from the injury to the public generally, though not necessarily exclusive to the plaintiff. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80. Two factors weigh strongly in favor of prudential standing: (1) the importance of the question to the public, and (2) whether the statute at issue would effectively be immunized from review if the plaintiff were denied standing. *Id.* ¶ 33. There is no question that prudential standing is satisfied here.

purposes. These courts emphasize that this injury exists regardless of whether the plaintiff could ultimately obtain the benefit if not for the barrier; all that matters is that the plaintiff is otherwise eligible and willing to apply.

Here, Plaintiffs have made detailed allegations that although they desperately wish to obtain program scholarships to help afford to send their children to private school, DOR's Rule 1 deprives them of the opportunity to apply for and receive these scholarships—simply because the school of their choice is religious. Accordingly, Plaintiffs have alleged that Rule 1 violates their rights to religious freedom and equal protection. These allegations are more than sufficient to establish injury under the case law.

DOR's Motion to Dismiss is without basis and should be denied.

A. Plaintiffs Have Sufficiently Alleged Injury for Standing.

The case law is clear that plaintiffs have standing to challenge a government program by alleging that they are ready and willing to apply to the program, but that the program imposes a discriminatory barrier to their participation. This has been held by the Montana Supreme Court, as well as by the U.S. Supreme Court, to which the Montana Supreme Court "often" looks to "for guidance in applying Montana's standing requirements." *Gazelka v. St. Peter's Hosp.*, 2015 MT 127, ¶ 15, 379 Mont. 142, 347 P.3d 1287. Here, Plaintiffs' allegations easily satisfy this injury requirement.

Gazelka is directly on point. There, the Montana Supreme Court stated that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," the injury "is the denial of equal treatment resulting from the imposition of the barrier." *Id.* ¶ 14 (*quoting Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("*Contractors*")). The Court emphasized that because it is the barrier causing the injury, "not the ultimate inability to

obtain the benefit," the plaintiff "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.; see also Chipman*, ¶ 28-36 (recognizing standing of employees to challenge employers' decision to end policy that allowed them to accrue benefits that vested after twenty-five years of employment, even though it was uncertain whether the employees would work for the employer for twenty-five years or otherwise accrue the benefits).

Contractors, the case on which *Gazelka* primarily relies, is particularly illustrative. *See* 508 U.S. at 658-60. There, plaintiffs brought an equal protection challenge to a city program that gave minority-owned businesses preferential treatment in the award of city contracts. 508 U.S. at 656. Like DOR here, the city argued the plaintiff lacked standing because it could not show that any of its members would have received a contract absent the preference policy. *Id.* at 666-68. The Eleventh Circuit agreed, but the U.S. Supreme Court reversed. *Id.* at 664. The Supreme Court found that the plaintiff was not required to show that it ultimately would be able to successfully bid on any of the contracts in order to establish standing. Instead, the plaintiff "need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* at 666. In other words, the "injury . . . is the inability to compete on an equal footing" and be fairly "considered" in the program's application process. *Id.* at 666. *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 281 n. 14 (1978) (finding medical school applicant's injury for standing purposes was the University's "decision not to permit [him] to compete for all 100 places in the class, simply because of his race" and further finding that it was irrelevant to his standing whether the University ultimately would have accepted the applicant if not for that discriminatory decision).

While *Gazelka, Contractors,* and *Bakke* involved alleged equal protection violations, the principle for which they stand applies to other discriminatory barriers as well, including those

involving the state and federal religion clauses. In *Arizona Christian School Tuition Organization v. Winn*, for example, the U.S. Supreme Court stated:

> Standing in Establishment Clause cases may be shown in various ways. Some plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom. Other plaintiffs may demonstrate standing on the ground that they have incurred a cost *or been denied a benefit* on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, *such as when the availability of a tax exemption is conditioned on religious affiliation.*

563 U.S. 125, 129-30 (2011) (emphases added). Plaintiffs here allege precisely this discriminatory denial of benefits.

Plaintiffs' allegations easily meet the injury requirement set forth in *Gazelka, Contractors, Bakke,* and *Winn.* Each plaintiff wishes to obtain program scholarships for their children to attend Stillwater Christian. Compl. ¶¶ 79, 98, 111; *see also* DOR's Br. in Support of MTD at 9 (conceding that Plaintiffs "ha[ve] an interest in [their] children receiving scholarships when they become available"). Plaintiffs also each alleged that they would be "eligible to receive scholarships under the program" if not for Rule 1's prohibition on using scholarships at religious schools. *Id.* ¶¶ 75, 96, 109. Each Plaintiff further alleged that "[b]ut for Rule 1, [she] would apply for program scholarships for [her children] as soon as an SO begins accepting scholarship applications." *Id.* ¶¶ 79, 99, 112. Finally, they alleged that Rule 1 constitutes an unconstitutional barrier to their participation in the program in violation of the federal and Montana rights to religious freedom and equal protection. *Id.* ¶¶ 5, 8, 133-74. Thus, Plaintiffs have sufficiently alleged that they are "able and ready to [apply for scholarships] and that a discriminatory policy prevents [them] from doing so." *See Contractors*, 508 U.S. at 666.

In fact, Plaintiffs' injury here is even more severe than that recognized in *Contractors* and *Bakke*. In those cases, the challenged program merely made it more difficult for plaintiffs to secure their desired government benefit. Here, in contrast, Rule 1 totally precludes Plaintiffs and

families like them from securing any scholarships for the school of their choice. Whether the program ultimately generates one or a thousand scholarships, Rule 1 means Plaintiffs' children will be ineligible for them all.

Thus, Plaintiffs have more than satisfied the injury requirement necessary to maintain standing in this lawsuit.

B. There Is No Legal or Factual Support for DOR's Argument That Plaintiffs' Injury Is Too "Speculative."

Despite these directly on-point cases, DOR contends that Plaintiffs lack standing. Its Motion to Dismiss boils down to two arguments: First, it argues that that there is no assurance that Plaintiffs could obtain program scholarships if Rule 1 was not in effect. DOR's Br. in Support of MTD at 8-10. Second, it argues there is no guarantee that Rule 1's disqualification of Plaintiffs from the program would force Plaintiffs to withdraw their children from their chosen school. *Id.* According to DOR, this makes Plaintiffs' injury "speculative" and "hypothetical," and their lawsuit merely an "academic" exercise that is not justiciable. *Id.* at 8-9. DOR is mistaken.

As explained above, the exact likelihood of Plaintiffs receiving a scholarship absent Rule 1 is irrelevant. As *Gazelka* and *Contractors* emphasize, Plaintiffs "need not allege that [they] would have obtained the benefit but for the barrier in order to establish standing." *Gazelka*, ¶ 14 (quoting *Contractors*, 508 U.S. at 666). All that matters is that Plaintiffs are "able and ready to [apply for scholarships] and that a discriminatory policy prevents [them] from doing so on an equal basis." *See Contractors*, 508 U.S.at 666. Rule 1 is such a policy, and this Court is not required to undertake a statistical analysis to determine the probability of Plaintiffs receiving a scholarship if it strikes down Rule 1.

DOR similarly argues that there is not yet an SO registered to administer the program and Plaintiffs are required to apply to an SO to establish standing. DOR's MTD at 8-10. These arguments are factually and legally incorrect. First, the day after DOR filed its Motion, it approved Big Sky Scholarships' application to be an SO. Hansen Aff. ¶ 2. In fact, Big Sky has already started fundraising for scholarships for the 2016-2017 school year, and if not for Rule 1, Big Sky would like to award scholarships to children attending Plaintiffs' chosen school, Stillwater Christian. Hansen Aff. ¶ 7, 12. Conversely, Stillwater Christian is enthusiastic about working with an SO like Big Sky to help its students obtain scholarships, and cannot do so only because of Rule 1. Makowski Aff. ¶ 7. Moreover, DOR is wrong in suggesting that Plaintiffs are required to apply to an SO to establish standing. It is undisputed that Plaintiffs are ineligible to receive scholarships to their chosen school because of DOR's Rule 1. Plaintiffs are not required to perform futile acts to establish standing. *E.g.*, *Sporhase v. Neb.*, 458 U.S. 941, 945 n. 2 (1982) (holding that plaintiffs challenging the constitutionality of a requirement for obtaining a permit are not required to apply for the permit to obtain standing, since they would "not have been granted a permit had they applied to one").

Finally, DOR argues that there is no guarantee that despite Plaintiffs' economic hardship, Plaintiffs would be forced to withdraw their children from Stillwater Christian if they do not receive a scholarship. DOR's Br. in Support of MTD at 8-9. But this argument misses the mark entirely. Accepting this argument would be like the U.S. Supreme Court denying standing in *Contractors* because there was no allegation that the government's discriminatory program would cause the plaintiff businesses to go bankrupt, or denying standing to the medical student applicant in *Bakke* because there was no allegation he could not get accepted into a different school. Plaintiffs have alleged that they must make tremendous financial sacrifices to afford

their children's school, and they do not know on a "year-to-year" basis whether they will continue to be able to afford the tuition payments. Compl. ¶¶ 14-16, 66-67, 72, 85, 94, 107. Plaintiffs are not required to first fail in their ardent efforts to keep their children in their chosen school in order to bring this lawsuit. The case law shows the negative ramifications of DOR's discrimination on Plaintiffs' lives is immaterial for standing analysis; all that matters is the discrimination itself. Moreover, receiving scholarship money, regardless of how necessary it would be to keeping Plaintiffs' children in their school, would obviously be a financial benefit to Plaintiffs.

Thus, Plaintiffs have established the requisite injury to maintain standing to challenge DOR's Rule 1. DOR fails to cite a single case to the contrary and its Motion to Dismiss should be denied.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny the Defendants' Motion to Dismiss for Lack of Standing.

DATED this 18th day of February, 2016.

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was duly served upon the following as indicated below.

Daniel J. Whyte Brendan Beatty Montana Department of Revenue Sam W. Mitchell Building 125 North Roberts Room 476 P.O. Box 7701 Helena, Montana 59604-7701 dwhyte@mt.gov bbeatty@mt.gov	[X] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail

DATED this 18th day of February, 2016.

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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER, Plaintiffs, v. MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants.	Cause No. DV 15-1152A Judge David M. Ortley **AFFIDAVIT OF KRISTIN HANSEN IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

STATE OF MONTANTA)

) ss:

COUNTY OF HILL)

Kristin Hansen, on oath, states:

1. I am the president and sole employee of the Montana nonprofit organization, Big Sky Scholarships, a registered Scholarship Organization ("SO") under the State's tax credit scholarship program.
2. I am also a Montana state senator.
3. I applied to register Big Sky Scholarships with the Montana Department of Revenue and was approved by the Department on February 2, 2016.
4. I am unaware of any other registered SO.
5. Big Sky Scholarships wishes to award scholarships statewide for students to attend any qualified education provider, regardless of whether they are religious or not.
6. Mission Valley Christian Academy, for example, is seeking affiliation with Big Sky Scholarships so that its students can obtain scholarships.
7. Big Sky Scholarships also wishes to affiliate with other religious private schools, including Stillwater Christian School.
8. However, because of the Department of Revenue's rule restricting scholarships to only students attending nonreligious schools, Big Sky cannot award scholarships to any student attending a religious private school.
9. The Department of Revenue's website for SOs requires Big Sky Scholarships to affiliate with at least two private schools. Yet it does not allow Big Sky Scholarships to affiliate with any religious private schools.
10. I spoke to several people at the Department of Revenue, including Lee Baerlocher, Bob Finstad, Larry Sullivan, and Defendants' counsel, Dan Whyte, and they confirmed that Big Sky cannot affiliate with any religious private school.
11. Instead, Big Sky Scholarships can only list on the website the two nonreligious private schools that Big Sky affiliates with, Cottonwood Day School and Fortis Leadership Academy.

12. I am currently soliciting donations for Big Sky and have already received some donations.
13. However, I anticipate having trouble fundraising due to the Department of Revenue's rule excluding scholarships to students attending religious schools, which are the majority of private schools in the state. I have already had four potential donors deny me donations for this reason.

Kristin Hansen

SUBSCRIBED AND SWORN TO
before me this 16 day of February, 2016:

VICKI RUHKAMP
NOTARY PUBLIC
for the State of MONTANA
Residing at Havre, Montana
MY COMM. EXPIRES OCT. 5, 2017

VICKI RUHKAMP NOTARIAL SEAL STATE OF MONTANA

Vicki Ruhkamp
NOTARY PUBLIC

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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER, Plaintiffs, v. MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants.	Cause No. DV 15-1152A Judge David M. Ortley **AFFIDAVIT OF DANIEL MAKOWSKI IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

STATE OF MONTANTA)

) ss:

COUNTY OF FLATHEAD)

Daniel Makowski, on oath, states:

1. My name is Daniel Makowski, and I am the Head of School at Stillwater Christian School in Kalispell, Montana.
2. As head of school, I am authorized to represent the position of Stillwater Christian School in this affidavit.
3. Stillwater serves grades kindergarten to 12th grade. It is accredited by the Commission on Schools of the Northwest Accreditation Commission.
4. Stillwater is also a religious school. It is accredited by the Association of Christian Schools International and is a member in good standing with the Council on Educational Standards & Accountability.
5. Stillwater Christian School has many students who are of limited financial means. Although Stillwater offers generous financial aid, it is still a tremendous struggle for many families to pay our tuition.
6. In addition, many families have told us they wish to attend our school but cannot afford to do so.
7. Stillwater Christian School would like to participate and affiliate with scholarship organizations formed under Montana's new tax-credit scholarship program so that families wishing to attend our school, or who currently attend our school, can receive program scholarships to help them afford the cost of our tuition. But we cannot currently do so because of the Department of Revenue rule excluding students attending religious schools from receiving scholarships.

Daniel Makowski

SUBSCRIBED AND SWORN TO
before me this 17 day of February 2016:

NOTARY PUBLIC